

APPROVED



THE HIGH COURT

[2023] IEHC 394

2020 3384 P

GABRIEL MITCHELL AND MARCELLA MITCHELL

PLAINTIFFS

V.

THE HEALTH SERVICE EXECUTIVE

DEFENDANT

AND

SONIC HEALTHCARE (IRELAND) LIMITED

AND

CLINICAL PATHOLOGY LABORATORIES INCORPORATED

THIRD PARTIES

Judgment of Mr. Justice Tony O'Connor delivered on 6 July 2023

Claims of the plaintiffs

1. The plaintiffs as parents of their daughter, (“**Aoife**”) claim that they suffered nervous shock due to the breach of duty owed to them by the defendant (“**the HSE**”):-

(i) On learning in January 2014 that their daughter, Aoife, had been diagnosed with metastatic cervical cancer;

(ii) On accompanying Aoife through the trauma of having to lose her much longed for pregnancy in March 2014 due to the diagnosis;

(iii) On witnessing the circumstances up to and including Aoife’s passing in April 2015;

(iv) On learning in 2018 that Aoife’s death was unnecessary and that there had been a significant delay in disclosing available information about the nature of the measures which ought to have been taken for Aoife’s health and survival;

(v) On hearing in May 2018 from Aoife’s consultant gynaecologist/colposcopist (“the consultant colposcopist”) about the cause of Aoife’s death “in an inappropriate manner”;

(vi) On learning later that the information disclosed in May 2018 was available to the consultant colposcopist since June 2016.

Preliminary issues

2. Two substantive preliminary questions have arisen for determination: -

(i) Whether the claim of the plaintiffs against the HSE which in turn seeks indemnity or contribution from the second named third party (“CPL”) in respect of that claim should be struck out on the grounds that it discloses no reasonable cause of action having regard to the judgment in *Morrissey v. Health Service Executive, Quest Diagnostic Inc and Medlab Pathology Ltd.* [2019] IEHC 268 (“**the Morrissey judgment**”), where Cross J. held that circumstances akin to those presenting in these proceedings did not create a duty of care on the part of the defendants “not to cause [Mr. Morrissey] a reasonably foreseeable injury in the form of nervous shock” (“**the Morrissey point**”).

(ii) Whether the plaintiffs are barred from issuing or prosecuting these proceedings because they were listed as statutory dependants in proceedings entitled *Pádraig Creaven v. Health Service Executive, Sonic Healthcare Ireland Ltd., Medlab Pathology Ltd., Clinical Pathology Laboratories Inc., and Coombe Women and Infants University Hospital*, having record number 2018 10202 which were settled with an apology read into the court record (“**the 2018 proceedings**”). The HSE and CPL rely on s. 48 (2) of the Civil Liability Act 1961 which provides: -

“(2) Only one action for damages may be brought against the same person in respect of the death”.

(“**the s. 48 (2) point**”). In short, the question is whether the fatal injury claim taken by Mr. Creaven in respect of the wrongful death of his wife Aoife precludes the plaintiffs (parents of Aoife) from prosecuting these proceedings. The plaintiffs and the other statutory dependants of Aoife agreed the distribution of the solatium paid under the settlement of the 2018 proceedings which also provided for the recording in open court on 4 March 2021 of the following statement: -

“The HSE and CPL wish to acknowledge that this is a uniquely tragic case, which has had the most devastating consequences for Aoife, her husband Pádraig Creaven, the plaintiff in these proceedings, and for her family. We deeply regret the pain, suffering and incalculable loss suffered/experienced by Aoife, Pádraig and her family. The HSE reiterates its sincere and unreserved apology to Mr. Creaven for the failure by the CervicalCheck Programme to communicate with him in a timely and appropriate way, the results of an audit that indicated a change in the interpretation of Aoife’s smear taken on 8 August 2011”.

Relevant procedural history

Plaintiffs v. HSE

3. The personal injuries summons in these proceedings was issued on 11 May 2020 with verifying affidavits by both plaintiffs filed on 18 October 2021. The HSE delivered its defence on 20 May 2022 without a specific reference to the preliminary issues now before the Court. Notice of trial dated 9 June 2022 was served by the solicitors for the plaintiffs and a commencement of trial date of 10 May 2023 was subsequently allocated. The Deputy Head of “Client Screening Services, National Screening Service”, swore the affidavit of verification for the defence of the HSE on 5 May 2023.

HSE v. Third parties

4. A third party notice directed to CPL was issued on 26 March 2021 followed by the delivery of the third party statement of claim on 3 December 2021. Solicitors for CPL delivered a defence to the claim by the HSE on 25 January 2023 which pleaded as a preliminary issue that the claim of the plaintiffs: -

“for damages for personal injuries arising out of the alleged misinterpretation of [Aoife’s] cervical smear sample in bound to fail on the grounds of public policy and/or on the grounds that the [HSE] and by extension [CPL] do not owe the plaintiffs a duty of care”. The defence for CPL also pleaded the s. 48 (2) point.

5. The HSE discontinued its third party claim against the first named third party by notice dated 8 February 2023.

Motions for trial of preliminary issues

6. On 24 February 2023, CPL issued a notice of motion seeking the trial of preliminary issues, a modular trial or an order striking out the plaintiff’s claim against the HSE and thus the claim of the HSE against CPL. On 9 March 2023, the HSE issued a similar notice of motion. When the motions were listed in April 2023, counsel for the plaintiffs successfully applied for them to be transferred to Coffey J. who had already allocated 10 May 2023 for the commencement of the trial. Coffey J. directed that the motions be transferred to the judge hearing the trial of the proceedings.

Commencement of trial

First ruling

7. As the plaintiffs had not sworn affidavits in reply to the affidavits by solicitors for the HSE and CPL in the motions and given the desirability for the Court to understand the claims and motions, I ruled that counsel for the plaintiffs should open the case.

Second ruling

8. Counsel for the HSE and CPL later applied for the motions to be determined in advance of the Court hearing evidence which was resisted by counsel for the plaintiff. This Court then delivered its second ruling which allowed each of the plaintiffs and Mr Creaven to be examined

and cross-examined on 11 May 2023 and 12 May 2023 without deciding on when the applications in relation to the preliminary issues would be heard.

Third ruling

9. Replying outline submissions for the plaintiffs to the written outline submissions for the HSE and CPL in respect of both motions were delivered on 19 May 2023 in advance of resuming the trial on 23 May 2023.

Fourth ruling

10. On 24 May 2023, I delivered a detailed ruling and directed that the following preliminary issues which abbreviated the wording in the Notices of Motion be tried before hearing further evidence: -

(i) Whether the plaintiffs are barred from issuing and prosecuting these proceedings because they were listed as statutory dependants in the 2018 proceedings;

(ii) Whether the HSE owed a duty of care to the plaintiffs by virtue of the *Morrissey* judgment in respect of any or all of the six incidents which are alleged to have caused “nervous shock” to the plaintiff.

The Morrissey point

11. In *Morrissey*, Cross J. determined that the plaintiff wife, who was alive at the time of his judgment, and of the Supreme Court judgment delivered on 19 March 2020 [2020] IESC 6, and her husband, were entitled to damages under various headings, one of which was set aside on appeal. None of the parties appealed the separate award in favour of Mrs. Morrissey, grounded upon the admitted breach of duty on the part of the HSE in failing to advise her about the results of an audit in 2014. Cross J. had awarded “nominal” damages of €10,000 to Mrs. Morrissey for the said “wrong or injuria”. This is the heading of damages which is the focus of

the “Morrissey point” for this judgment. Mr. Morrissey did not appeal the decision of Cross J. not to award him damages for that alleged wrong.

12. In the proceedings before this Court the HSE does not admit a breach of duty to advise the plaintiffs of the 2014 result. Whereas the HSE admitted its breach of duty to Mrs. Morrissey, it did not admit a breach of duty to Mr. Morrissey in that regard. In addition, the HSE does not admit a breach of duty to notify the plaintiffs of the said discovery on 16 June 2016 when CervicalCheck (the national cervical screening programme) wrote to the consultant colposcopist. The plaintiffs, together with Mr. Creaven were so informed of that discovery by the consultant colposcopist in May 2018.

Submissions for the plaintiffs on the Morrissey point

13. Counsel for the plaintiffs clarified that the plaintiffs will not ask the Court to revisit its finding on the Morrissey point once it is determined. More significantly, counsel also accepted the application of the principle of a court of first instance following the decision of a judge of equal jurisdiction as articulated by Clarke J. in *Re: Worldport Ireland Ltd. (in liquidation)* (Unreported, High Court, 16 June 2005) [2005] IEHC 189 (“*Worldport*”) and adopted in *Kadri v. the Governor of Wheatfield Prison* [2012] 2 I.L.R.M. 392 (“*Kadri*”). Essentially, counsel for the plaintiffs submit that the Morrissey judgment which decided that the HSE did not owe a duty of care to Mr. Morrissey to notify him of the relevant audit information, should not be relied upon because “there are substantial reasons for believing that the [*Morrissey*] judgment was wrong.

14. In this context the following paragraph from *Worldport* (pp. 7 – 8) was dissected and commented upon as follows with the subparagraphs inserted by this Court for ease of reference: -

“Amongst the circumstances where it may be appropriate for a court to come to a different view would be [1] where it was clear that the initial decision was not based

upon a review of significant relevant authority [2] where there was a clear error in the judgment or [3] where the judgment sought to be revisited was delivered a sufficiently lengthy period in the past so that the jurisprudence of the court in the relevant area might be said to have advanced in the intervening period”.

[1] Review of relevant authority

15. In relation to subpara. [1] the review of relevant authority, counsel explained that many of the counsel before this Court had represented various parties in Morrissey and that they can accept that Morrissey was heard and determined expeditiously given the declining health of Mrs. Morrissey. Cross J. had directed the filing of written submissions and did not hear oral submissions. Counsel brought the Court to relevant excerpts from the written submissions for each of the parties in Morrissey.

16. Counsel noted that the HSE had only informed Cross J. that: -

(i) Mr. Morrissey “gave evidence of further shock at learning in May 2018 that the results of the audit had not been disclosed”;

(ii) The HSE did not contest the nervous shock claim of Mr. Morrissey and only submitted “as a matter of principle any duty of care regarding disclosure was owed to [Mrs. Morrissey] and no more.... [T]o extend the duty to disclose beyond Mrs. Morrissey would be a quantum leap in the law”;

(iii) The HSE had no issue about Mr. Morrissey seeking damages for nervous shock by reason of the negligent misreading of Mrs. Morrissey’s slides;

(iv) The HSE remained silent on the issue of nervous shock caused to Mr. Morrissey.

17. Quest was the defendant which had reported on a 2009 slide and submitted to Cross J. that Mr. Morrissey was only entitled to maintain a claim in relation to nervous shock and loss

of consortium which was significantly attributable to the non-disclosure of the audit results by the HSE.

Medlab

18. Medlab, the party which had reported on Mrs. Morrissey's 2012 slide, merely submitted that Mr. Morrissey's claim for nervous shock was substantially contributed to by the HSE's failure to disclose the audit results.

19. In conclusion on this aspect, counsel for the plaintiffs submitted that Cross J. was not entitled to rule out Mr. Morrissey's claim for nervous shock because each of the defendants had not contested the claim for nervous shock in their submissions. Cross J., according to counsel, had not been addressed about the application of the five principles in *Kelly v. Hennessy* [1995] 3 IR 253, but nevertheless proceeded to his conclusions in paras. 195 – 202 of the Morrissey judgment without the relevant authorities having been opened.

[2] Clear error in the judgment

20. Counsel for the plaintiffs when addressing this second limb of Worldport, stated that there was a "total error of judgment by Cross J.". Apart from ignoring the absence of a dispute, counsel submitted that it was "utterly absurd" to have found that "Mr. Morrissey's claim for damages for personal injuries arising from the misdiagnosis of cancer should fail on public policy" and to out – rule generally any claim for nervous shock arising from the misdiagnosis given to another person. Counsel tempered this submission by accepting "the absurdity" of a proposition that every spouse or close family member of a victim is entitled to compensation for psychological or physical stress relating to medical malpractice directly affecting another family member.

21. However, counsel instanced a mother who claims for nervous shock for the trauma suffered during what should be a healthy delivery save for a negligent post-delivery mismanagement issue as a case where a nervous shock claim can succeed despite the general ruling by Cross J. on public policy grounds in *Morrissey*.

[3] Advancement of jurisprudence in intervening period

22. While counsel for the plaintiffs acknowledged that it was only just over four years since the *Morrissey* judgment, he referred to a report in *the Irish Times* published on 21 January 2020 about a settlement in a claim by family members of a pregnant woman who had been kept on life support in order to protect her unborn child due to perceived implications of the then – standing 8th Amendment to the Constitution. The report from *the Irish Times* referred to earlier nervous shock claims including a payment of €150,000 to the daughter of the deceased who witnessed the deteriorating condition of her mother on life support. Counsel submitted that there was further anecdotal evidence of the HSE having compensated family members for nervous shock following medical malpractice which belied the denial by the HSE in these proceedings of a nervous shock cause of action for the plaintiff parents.

Discussion on Morrissey Point

23. Rather than describing in detail the submissions for the HSE and CPL, which support the proposition that the plaintiffs do not have a stateable cause of action for nervous shock based on the *Morrissey* judgment, the Court proceeds to discuss the effect of the *Morrissey* point in these proceedings while adopting many of the submissions made on behalf of the HSE and CPL. The above dissection of *Worldport* does not take away from the discretion of each judge to find whether a duty of care exists. *Worldport* has a non-exhaustive list of

circumstances to consider. Ticking off headings can divert attention from the view which ought to be taken.

24. Evidence or submissions may assist a Court to change a view about a duty of care owed. The following two sentences form the judgment of Finlay Geoghegan J. in *O’Riordan v. O’Connor* [2015] 1 I.R. 551 at 560 summarise what may occur:-

“I am aware that the final conclusion in this judgment is contrary to that reached in an ex tempore decision given by me in the Monday motion list on 26 July 2004 in Sarth Investments Ltd (in receivership and liquidation). The issues were considered in greater detail in the submissions in this application and I reserved my decision. Whilst I regret the inconsistency, having considered the submissions made and authorities to which I was referred [I] consider I am bound to so decide”.

So when this Court discusses the binding effect of the Morrissey judgment under the Worldport headings, it does not lose sight of its obligation to consider all of the submissions made in these proceedings.

Worldport [1] – review of relevant authorities

25. Clarke C.J. for the Supreme Court in the appeal from the Morrissey judgment, *Ruth Morrissey and Paul Morrissey v. Health Service Executive, Quest Diagnostics Incorporated and Medlab Pathology Limited* (Unreported, 19 March 2020) [2020] IESC 6 (“**the Morrissey Supreme Court appeal**”) and particularly at para. 16.4 described the “laudable and understandable reasons [for] a somewhat truncated procedure [that] was adopted in the High Court in view of the deteriorating condition of Mrs. Morrissey”. The fact that the Morrissey point was not appealed to the Supreme Court does not concern this Court; a relevant finding about duty of care was made. The Court has no interest in learning about how or why an appeal was not pursued.

26. This Court does not favour the introduction of written submissions made in other proceedings in order to challenge a binding conclusion on the law in that other set of proceedings. If such a practice developed, there will be unnecessary repetition and a potential for selectivity which the court could not supervise.

27. CPL was not a party in the Morrissey proceedings. There is merit in the submission for CPL that it may rely on the precedent established in the Morrissey proceedings.

28. The Court understands how a generalisation in a judgment should be tempered so that a finding about the law ought to be directed to the presenting facts as opposed to other facts.

29. Point [1] of *Worldport*, which refers to the proper review of the authorities for a proposition in law prompts the Court to look at the authorities relied upon by Cross J. It is not necessary to endorse Cross J's approach, for example, to "issues of countervailing policy". Any reluctance on my part to so endorse does not take away from the finding that the HSE did not owe a duty of care to relatives of a victim who were negligently served by the screening service.

30. Cross J. identified the basis for the causation nexus. Cross J. referred to the analysis in *Mullally v. Bus Eireann* [1992] ILRM 722 (the reasonable foreseeability of the horrific and terrifying sights arising from a serious bus accident) before concluding that the real issue for Mr. Morrissey's claim was whether the defendants owed him a duty of care and whether his injuries were reasonably foreseeable.

31. No evidence was heard in Morrissey or in these proceedings about what a screener or a reviewer could reasonably have foreseen for Mr. Morrissey or for the plaintiffs. Cross J. did not believe "...that a reasonable person..." in the relevant years "... could reasonably have concluded that if they negligently misread the slides or failed to tell Mrs Morrissey [Aoife in this case] of the results ..." that Mr. Morrissey or the plaintiffs "would suffer a recognisable physical and mental injury. That assessment does not require evidence of what a screener or

reviewer would have reasonably concluded in those years. The Court decides whether a duty of care exists and what the reasonable person could reasonably foresee.

32. Cross J. discussed the five requirements for a successful claim for nervous shock as identified by Hamilton C. J. in *Kelly v. Hennessy* [1995] 3 IR 253 at pp. 258 – 259 and [1996] 1 ILRM 321 at pp. 325-326. Cross J. concentrated on the last of the five requirements: - “The plaintiff must show that the defendant owed him or her a duty of care not to cause him or her a reasonably foreseeable injury in the form of nervous shock”.

33. Cross J. approached the claim “on the basis of the duty of care issue [because it] contrasts with the analysis as is sometimes engaged in courts in England as to distinction between “primary” and “secondary” victims”. That approach tallies with the judgments in *Sheehan v Bus Eireann and Dower* [2022] IECA 28. In fact Sir Vos MR in *Paul v The Royal Wolverhampton NHS Trust* and two other linked cases (delivered on 13 January 2022 [2022] EWCA Civ 12) expressed reservations about the interpretation of the limitations in English courts on liability to secondary victims, such that permission was granted to the claimants to appeal to the Supreme Court in order to review the English law set out by Dyson LJ in *Crystal Taylor v A Novo (UK) Ltd* [2013] EWCA Civ 194 (Court of Appeal). The judgment of the UK Supreme Court was reserved on 18 May 2023 in that appeal.

34. I acknowledge the point made on behalf of the plaintiffs that a mother delivering a child may suffer foreseeable trauma from the mismanagement of her newborn. However, Cross J. only decided that a duty was not owed to Mr. Morrissey. Mr. Morrissey might be considered more connected to Mrs. Morrissey than the plaintiffs were to Aoife. Mr. Morrissey was a devoted husband and the plaintiff parents were adoring parents. Comparing similar tragic circumstances achieves little. In this claim, the plaintiffs do not seek to elevate themselves to a higher degree of connection than there was between Mr. Morrissey and his late wife.

35. In the context of policy, I clarify that it is always open to the legislature to provide for a duty of care as was done recently for the open disclosure of patient safety incidents in Part 4 of the Civil Liability (Amendment) Act 2017 together with Part 4 of the Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023 (yet to be commenced). Those provisions read as a whole, tend to support the view from a policy perspective about the absence of the duty claimed by the plaintiffs. There is now a statutory duty for a health service provider to disclose a “notifiable incident”. Significantly, there is a specific exclusion in the definition of “Health Service” in s. 2(1)(f) of the 2023 Act for “screening carried out by a cancer screening service”. I shall revert to those provisions later.

Worldport [2] - Clear error in the judgment?

36. The process adopted by Cross J. leading to the Morrissey judgment was necessitated by the deteriorating condition of Mrs. Morrissey, but it is not relevant to my consideration of whether there was a “clear error in the judgment”. Similarly, the absence of an appeal on the Morrissey point also does not affect this second element of Worldport.

37. Just because an authority is not opened before a trial judge who cites that authority, is not sufficient to undermine a judgment. This is not an appeal court. A review of the significant relevant authorities was undertaken as described earlier.

38. The Morrissey judgment is only authority for the proposition that there was no duty of care owed to relatives by those providing screening services to other family members which arose in that claim and which are now present before this Court.

39. There are no substantial reasons for finding that Cross J was wrong about the absence of the duty of care claimed. It is not necessary for the Court to consider the criticism of the conclusion in the Morrissey judgment that even if a duty of care was found to exist, Mr. Morrissey’s relevant claim would fail on “public policy alone”. The Court limits its comment

to mentioning again the legislature's recent introduction of statutory provisions for notifiable incidents with an exclusion for screening services.

40. Until the Court of Appeal or the Supreme Court find otherwise than Cross J did, there is no substantial reason for this Court to disagree with Cross J on the Morrissey point.

Worldport [3] Intervening period since Morrissey judgment

41. There was no advancement of jurisprudence in the period since the Morrissey judgment. The undisputed anecdotal evidence of claims for nervous shock in medical negligence claims other than in screening services carries little weight. I have already clarified that the Morrissey point as decided by Cross J has a rather narrow application; it concerns screening and reviews as arose in Morrissey and in these proceedings.

42. Para. 15.25 of the judgment delivered by O'Donnell J. in the Morrissey Supreme Court appeal appears quite apt, even though it was addressed to the expected loss of services claim as opposed to the claim for nervous shock of Mr. Morrissey:

“... [i]t seems to me that any further significant evolution in this area is one that can only be achieved by comprehensive legislation rather than by an evolution in the case law. I appreciate that the current situation does contain some anomalies, but the risk of creating further anomalies by a piecemeal approach on the part of the courts involving a radical alteration in the underlying common law assumption in this area is one which in my view, should be avoided”.

43. Similarly, the statutory provision for open disclosure of patient safety incidents in Part 4 of the Civil Liability (Amendment) Act 2017 together with Part 4 of the Patient Safety (Notifiable Incidents and Open Disclosure) Act 2023 (yet to be commenced) as already mentioned, indicates to the Court that it should be slow to introduce new causes of action in

this area. The last sentence in para. 15.24 of the judgment of O'Donnell J. in the Morrissey Supreme Court appeal resonates: -

“... .[I]ndeed, it seems to me that there is much merit in the argument put forward on behalf of Medlab, which drew attention to the fact that the only areas where the American courts would appear to have felt free to develop common law principles in this area was where there had not been legislative intervention”.

Summary of conclusions

44. Nothing is achieved by separating the first three elements of the claim which relate to a period when Aoife was alive from the complaints of incidents following her passing. They all come about through the operation of the screening service. The following five incidents are attributable to the alleged duties on the part of the screening service:-

- (i) Learning of the diagnosis in January 2014;
- (ii) Accompanying Aoife through the pregnancy trauma;
- (iii) Witnessing Aoife's deterioration and ultimate demise;
- (iv) Hearing about the breaches of duty leading to Aoife's death;
- (v) Hearing about the delay in the release of information;

Cross J. considered similar circumstances for Mr. Morrissey, albeit the HSE had admitted to Mrs. Morrissey in the proceedings that it had been in breach of its duty to Mrs. Morrissey by failing to inform her of the 2014 review result for her smear samples. Cross J. ruled that there was no duty of care owed to Mr. Morrissey. I have not been persuaded that there are substantial reasons for believing that Cross J ought to have found that a duty of care was or is owed by the screening service of the HSE to relatives such as Mr. Morrissey or the plaintiffs as parents of Aoife.

Difference with Morrissey

45. Significantly, that part of the plaintiffs' claim made two days prior to the commencement of the trial, about nervous shock caused by the consultant colposcopist in May 2018 did not feature in Morrissey. That claim was not particularised prior to the issue of the two notices of motion for which this Court gave directions. There is a dispute as to what occurred at the meeting in May 2018. Is there a particular relationship or duty of care which the plaintiffs will advance for that belatedly introduced ground? For the sake of clarity, I have not concluded whether there was or was not the asserted duty of care on the part of the HSE or its colposcopist owed to the plaintiffs in 2018. All I decide now is that Cross J.'s finding for Mr. Morrissey in relation to the duty of care for screening and reporting applies equally to the first five parts of the plaintiffs' claim

46. Subject to hearing further submissions from counsel after due consideration of this entire judgment, I propose merely to rule that the claim by the plaintiffs for damages in respect of personal injuries relating to the above five elements of their claim by reason of the Morrissey point is bound to fail due to the absence of the duty of care asserted. The Court will not decide until it hears further from the parties about the claim for nervous shock from the alleged breach of duty on the part of the colposcopist engaged by HSE for the: -

(i) The imparting in an allegedly inappropriate manner of the cause of death (as particularised for the first time at para. (a) of a notice of updated particulars of negligence and breach of duty dated 8 May 2023;

(ii) The alleged retention by the colposcopist of the information from June 2016 to May 2018 as particularised for the first time also at para. (b) of the said notice of updated particulars dated 8 May 2023.

S. 48 (2) point

Submissions for HSE and CPL

47. Counsel for the HSE and CPL submitted that a plain and literal reading of s. 48 (2) of the Civil Liability Act, 1961 contemplates only one set of proceedings against the same defendant arising out of the wrongful death of an injured person. The object of s. 48 (2) is to avoid a proliferation of separate actions against the same defendant according to counsel.

48. In oral submissions, counsel expanded on the objective and function of the Oireachtas in enacting s. 48 (2). The Oireachtas, according to counsel, set up a new cause of action with s. 48 (1) and balanced that by imposing a price, being that there could only be one action. Counsel for the HSE accepted that there had been a cause of action for nervous shock before the enactment of part (IV) of the Civil Liability Act, 1961. Counsel also flagged that the interpretation of a broad exclusion of all claims as now advocated has not been litigated since the Civil Liability Act, 1961 was enacted 62 years ago.

49. Counsel for the HSE submitted that s. 49 (1) (a) intended to provide the extent of the claims arising from the death of a person. This section provides: -

“(a) The damages under section 48 shall be—

(i) the total of such amounts (if any) as [. . .] the judge, [. . .] shall consider proportioned to the injury resulting from the death to each of the dependants, respectively, for whom or on whose behalf the action is brought, and

(ii) subject to paragraph (b) of this subsection, [now the €35,000 limit] the total of such amounts (if any) as the judge shall consider reasonable compensation for mental distress resulting from the death to each of such dependants”.

Statutes are to be interpreted according to the entire context, but the primary issue is the plain meaning of the words according to counsel who cited Heather Hill Management Co. CLG and Gabriel McGoldrick v. An Bord Pleanála, Burke Way Homes Ltd, notice party, and

the Attorney General notice party (Unreported, judgment of the Supreme Court 10 November 2022) [2022] IESC 43, in support of this statement.

Submissions for the plaintiffs

50. Counsel for the plaintiffs submitted that the s. 48 (2) point was “a really bad point” and rhetorically asked why the best minds in the Irish legal profession had never sought a determination of same in the 62 years since the enactment of the Civil Liability Act, 1961.

51. Counsel described the purported isolation of s. 48 (2) from the rest of part (IV) and all other provisions of the Civil Liability Act as “plucking out this subsection”. The part of the Act where s. 48 (2) appears is headed “Fatal Injuries” and it does not concern claims for nervous shock or personal injury inflicted by a tort committed on another person.

Discussion

52. The Court set out earlier details of the 2018 proceedings and the apology which was read into the court record on 4 March 2021. The plaintiffs acknowledge that they shared in the solatium paid in the settlement of the 2018 proceedings.

53. The personal injuries summons in these proceedings claims damages for the alleged breach of duty on the part of the HSE leading to “nervous shock, mental distress, loss, damage, inconvenience and expense”.

54. McMahon and Binchy in the Law of Torts (4th Edition) at para 42.02 correctly describe the action under s. 48(1) as being “... in the nature of a class action for the benefit of all dependants”. The authors refer at para 42.04 to the fact that any possible common law right of action as may have existed according to Dr John White’s comprehensive treatment of the exclusive remedy, “... has long been subsumed under these legislative provisions which, on a literal interpretation, appear to exclude any such common law gloss”.

55. The plaintiffs in these proceedings do not rely on a common law right to sue for wrongful death; they confine themselves to a claim described earlier for nervous shock from

the alleged breach of duty on the part of the screening service. The analysis and principles established in *Kelly v Hennessy* [1995] 3 IR 253 do not impinge upon the statutory right of dependants under Part IV of the Civil Liability Act 1961.

56. The plain wording and positioning of s.48 (2) in the legislation means that only one action may be brought in respect of the death. The common law claim for nervous shock within the confines of *Kelly v Hennessy* was not included. There was no specific abolition of claims for mental distress or personal injury which may be caused for example by an organisation which has a duty of care to others. *Expressio unius est exclusio alterius* is a principle which I paraphrase for this case as the specific exclusion of multiple causes of action for wrongful death does not abolish causes of action for other events. The plaintiffs are not barred from prosecuting these proceedings by virtue of s. 48 (2) of the Civil Liability Act 1961.

57. I invite Counsel to address me about whether and when the plaintiffs can proceed with the trial of these proceedings by relying on particulars delivered after the setting down of these proceedings and the issue of the Notices of Motion seeking a preliminary hearing.

58. During the hearing I mentioned that the HSE has the option of applying for a direction at the conclusion of the evidence for the plaintiffs or to proceed with evidence to defend the claim of the plaintiffs. It appears best that all parties revert to the Court about the practicalities in proceeding with the remainder of this trial before the orders following this judgment are perfected. I propose 10.15 on Friday 14 July 2023 for a short hearing in this regard.

Solicitors for the plaintiffs – Cian O’Carroll Solicitors.

Counsel for the plaintiffs – Jeremy Maher SC, Patrick Tracey SC and Ciara McGoldrick BL.

Solicitors for the defendant – Comyn Kelleher Tobin Eustace.

Counsel for the defendant – Eoin McCullough SC and Sarah Corcoran BL.

Solicitors for the second named third party – William Fry.

Counsel for the second named third party – Luan O’Braonain SC, Imogen McGrath SC and Padraic Hogan BL.